UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- v. -	:	S2 07 Cr. 541 (RPP)
DANIEL B. KARRON,	:	
Defendant.	:	

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL

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The Government respectfully submits this memorandum of law in opposition to the motion filed by Daniel B. Karron, the defendant, for a judgment of acquittal and, in the alternative, for a new trial, pursuant to Fed. R. Crim. P. 29 and 33.

For the reasons set forth below, the defendant's motion should be denied. The Government presented more than sufficient evidence to support the jury's guilty verdict, and this Court properly instructed the jury that, because money is fungible, there is no requirement that the Government trace the $5,000 or more alleged to be misapplied back to the federal grant.

PRELIMINARY STATEMENT

Indictment S2 Cr. 541 (RPP) (the "Indictment") was filed on or about May 21, 2008, in one count. Count One charged Daniel B. Karron, the President and Chief Technical Officer of Computer Aided Surgery, Inc. ("CASI"), with intentionally misapplying more than $5,000 of funds under the care of CASI, in violation of Title 18, United States Code, Section 666.

Trial against Karron began on June 2, 2008, and ended on June 11, 2008. At the close of all the evidence, the defendant moved under Rule 29 for a judgment of acquittal on the ground that there was insufficient evidence to show that the defendant intentionally misapplied federal grant funds. (Tr. 1235-38).[1] The Court denied the motion. (Tr. 1247). The jury returned a guilty verdict later that same afternoon.

On or about June 27, 2008, the defendant filed the instant motion renewing his Rule 29 motion for a judgment of acquittal on substantially the same grounds and, in the alternative, seeking a new trial pursuant to Rule 33 based on an alleged error in the Court's instructions to the jury.

STATEMENT OF FACTS

A. The Government's Case

1. The ATP Grant And The Applicable Rules

The evidence at trial showed that, from in or about October 2001 to in or about June 2003, Daniel B. Karron was the President and Chief Technical Officer of Computer Aided Surgery Inc., or CASI. (GX 10). In October 2001, CASI received a $2 million federal grant, to be disbursed over three years, from the Advanced Technology Program ("ATP") that was designed to support high-risk scientific research. (GX 11, 13; Tr. 56).

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[1] "Tr." refers to the trial transcript; "Br." refers to the defendant's Memorandum of Law in support of the instant motion for acquittal and a new trial; and "GX" refers to a Government exhibit at trial.

The rules of the federal grant were clear and simple: Recipients of the grant "must adhere to the budget" as approved by the National Institute of Standards and Technology ("NIST"), the office that administers the ATP grant. (Tr. 87, 265). A fixed dollar amount is allocated to each category in the approved budget (e.g., "Equipment," "Personnel," etc.), with each category further broken down in a detailed budget narrative that spells out exactly how the money is to be spent. (GX 10B). Grant recipients may not use federal funds to pay for items or services not included within the approved budget. (Tr. 87, 265).

While NIST recognized that changes to the approved budget may become necessary, prior written approval is required before federal funds may be used in a way different from that provided for in the approved budget. (GX 2, at 3; GX 4, at 7; Tr. 87, 94, 108-09, 265, 267). The only exception to this requirement is where the transfer of funds among approved categories does not exceed 10% of the total annual budget. (GX 2, at 3; Tr. 87, 348).

Furthermore, regardless of what non-ATP-specific rules may provide, ATP-specific rules trump less stringent generic regulations contained in the Code of Federal Regulations. See GX 2, at 3 ("In addition to the requirements specified in 15 C.F.R. 14.25, Recipients shall obtain prior written approval from the NIST Grants Officer for . . . [t]he transfer of funds among

direct cost categories . . . if the transfer exceeds 10% of the approved total annual budget. . . . Recipients are not authorized to create new budget categories without prior approval.") (first emphasis added); Tr. 232 ("[ATP rules] overrule[] any other federal cost principles."); Tr. 299 ("Your ATP rules supersede all other rules because they're program-specific rules.").

In addition to the basic requirement that a grant recipient must adhere to his approved budget, the ATP grant has program-specific funding principles that govern how ATP funds could be spent and, thus, whether certain items that a recipient seeks to include in the budget would meet with NIST's approval. One such principle is that ATP does not pay for "indirect costs," i.e., overhead expenses that do not directly relate to the research. Typical examples of such indirect costs include rent, utilities, facility renovations, legal fees, and general administrative costs. (Tr. 88; GX 1, Instructions For Form NIST-1262, Item K). It makes no difference whether the company receiving the ATP grant is working solely on the ATP-funded project, or whether it is working simultaneously on both ATP-funded and non-ATP-funded projects. (GX 1, at 6; GX 3, at 3). ATP funds cannot be used to pay for indirect costs, period. (Tr. 122-23; 256-57) ("Q: Would something like rents and utilities be an allowable expense under the grant rules if the only project

that the grant recipient was working on was the project funded by the ATP money? A: No. . . . It would make no difference at all."). Here, too, ATP rules trump non-ATP-specific rules applicable to other federal grants. See GX 1, at 6 ("Regardless of whether they are allowable under the Federal cost principles, the following are unallowable under ATP: . . . (b) Indirect costs"); Tr. 232.

Another funding principle relevant here is that ATP funds cannot be used to pay for sunk costs — i.e., costs incurred before the start of the ATP grant period. (Tr. 88, 298). This prohibition against using ATP funds to pay for pre-grant costs is a direct corollary of the general requirement that recipients use ATP funds only in accordance with the approved budget. Since ATP budget submissions are forward-looking and relate to projected expenses for upcoming years, pre-grant costs are necessarily excluded from the approved ATP budget and, hence, cannot be paid for using ATP funds. (GX 14; GX 22, at 3; Tr. 298).

2. The Defendant Knew About The Applicable ATP Rules

These terms and conditions governing the ATP grant were explained to the defendant on multiple occasions. Bettijoyce Lide, the ATP program manager responsible for the grant that had been awarded to CASI, testified that she met the defendant at a kick-off meeting in November 2001 when the project team conducted a slide-show presentation for Karron and the rest of the CASI

team that set forth the terms and conditions of the grant, including, most notably, the "prior approval" requirement (Tr. 108) and the prohibition against using ATP funds to pay indirect costs such as rent (Tr. 88, 109). After the meeting, in response to the defendant's inquiries about using ATP funds to pay for rent based on CASI's "unique circumstances," Lide kept saying no (Tr. 122-23), and kept reiterating the need for prior approval before any expenditure outside of the approved budget could be made (Tr. 123). In response to Lide's insistence on obtaining prior approval, Karron flippantly said that "no approval would be needed if he would just come and schmooze and take us to lunch." (Tr. 130).

Hope Snowden, the grant specialist responsible for reviewing CASI's budget submissions to the ATP program, also testified at trial. (Tr.262-65). Indeed, Snowden testified that her conversations with the defendant about the ATP rules preceded even the kick-off meeting to which Lide referred. (Tr. 257-59). "[R]ight after Karron was told he . . . would be receiving this federal fund" in October 2001, Karron called Snowden to ask whether ATP funds could be used to pay rent and utilities. (Tr. 258). Snowden told the defendant that "the answer was no, time and time again." (Tr. 259). Nonetheless, the defendant, along with his business manager Lee Gurfein, kept calling, "like a day apart, and they would consistently get the same exact answer,"

which was that rent and utilities "were unallowable costs, and, no, you cannot use federal funds." (Tr. 259). Snowden gave the same response to Karron and Gurfein again during the kick-off meeting in November 2001 when Lide and Snowden conducted the slide-show presentation explaining the importance of adhering to the approved budget (Tr. 265), the need to obtain prior written approval for any changes greater than 10% of the total annual budget (Tr. 298), and the rule against using ATP funds to pay for indirect and pre-grant costs (GX 4, at 6; Tr. 298).

But the phone calls from Karron and his manager Gurfein did not stop. Even after the kick-off meeting, Karron and Gurfein persisted in calling Snowden asking to use "federal funds to pay for rent and utilities." (Tr. 303). Once again, Snowden's response to them "was always no. No matter what [Karron] said, how he said it to me, it's no, these are taxpayers' money and we do not use that to pay for rent and utilities." (Tr. 303). Her response to Gurfein was the same: "No, again and again, absolutely not." (Tr. 303-04).

3. Karron Misapplied Federal Funds

Despite being told on multiple occasions in person, over the telephone, and through his business manager Lee Gurfein that he could not deviate from the research budget as approved by NIST, Karron did exactly that, and did so repeatedly. Over the course of a year and a half, the defendant misapplied close to

half a million in federal funds toward the payment of unauthorized expenses, including rent, utilities, a cleaning lady for his apartment, restaurant meals, and miscellaneous household items such as blenders, vacuum cleaners, power drills, and a GPS navigation device. (GX 101, 110, 114, 115).

The evidence that established Karron's guilt at trial was overwhelming. First, there is no dispute that Karron alone had signatory authority at CASI, and thus, no question that Karron was the person responsible for the misapplication of the grant funds. (Tr. 299-301). Although Lee Gurfein was initially hired on the understanding that he would have dual signatory authority with Karron, Lee's authority was stripped away one week after CASI was awarded the ATP grant, as documented by a letter Karron sent to NIST, dated October 11, 2001. See GX 21, at 3; Tr. 300-02; Tr. 639 (testimony of Lee Gurfein) ("Within a week exactly on October 11th . . . , I was stripped of my ability to control the business as I was told I would have."). And as shown by the Chase Bank records relating to CASI's business accounts(GX 81), the only signature that appears on the canceled checks is the defendant's.

Furthermore, the bank account records (GX 80, 81), the American Express ("AMEX") statements for the credit cards issued to CASI (GX 90), and invoices from various electronic equipment and hardware vendors (GX 100-104) establish, beyond any

reasonable doubt, where the money that funded CASI's business accounts came from and where that money went.

To facilitate the jury's review of the voluminous records, the Government called Belinda Riley, a Department of Commerce auditor who analyzed CASI's financial records, and qualified her, without any objection from the defense (Tr. 464-65), as an expert in accounting and auditing procedures.[2] Riley testified that, based on the Chase Bank records (GX 81), she created a database listing every transaction in CASI's bank

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[2] The defendant's assertion that Ms. Riley "was qualified as an expert" "over defense objection" is simply incorrect. (Br. at 4):

> Mr. Kwok: Your Honor, government offers Belinda Riley as an expert in accounting and auditing procedures.
>
> Mr. Rubinstein: No objection, Your Honor.
>
> The Court: All right. Ms. Riley is accepted as an expert in accounting [and] auditing procedures.

Tr. 464-65.

The two transcript citations contained in the defendant's brief are not to the contrary. (Br. 4). The first citation to page 466 of the transcript is altogether inapposite, as it relates to Ms. Riley's in-court identification of the defendant and contains no objection whatever from either party (Tr. 466).

The second citation to page 475 relates only to defense counsel's objection to the admission of GX 60, an audit report prepared by Riley, on the ground that the underlying documents that were the basis of GX 60 were not in evidence. The Court properly overruled the objection to the admission of that exhibit because, under Fed. R. Evid. 703, the underlying "facts or data need not be admissible in evidence in order for the opinion or inference" of an expert witness to be admitted.

accounts that covers the time period from October 1, 2001 to June 2003. (GX 110; Tr. 516-17, 533-38). Riley supplemented her database with information obtained from the AMEX credit card statements that lists the date of every credit card transaction and the vendor where a particular purchase was made (GX 110; Tr. 538-47).

With respect to CASI's source of funding, the financial records as summarized in Riley's databases indisputably establish that, with the exception of about $1,170 in refund checks in Year 2 of the grant, the ATP grant was, on balance, CASI's only source of funding. (GX 112, 113). While the defendant made a number of transfers from his own personal bank account to CASI's business accounts (GX 110, at 32 of 37 & 38 of 44) and forwent accepting salaries for a time (GX 110, at 39 of 44), these "contributions" to CASI were far outweighed by the personal loans the defendant made CASI lend him (GX 110, at 38 of 44; at 32 of 37).

For example, while the defendant wrote 7 checks in 2001 transferring $37,000 from his personal account to CASI's account and accepted only 8 paychecks totaling about $35,293 out of his approved salary of $175,000, the defendant also wrote 15 checks transferring about $129,850 from CASI's business accounts into his personal bank account and paid himself $60,000 in rent payments from the CASI business accounts. (GX 110 at 38-39 of 44). Adjusting for tax withholding from payroll (Tr. 806-07),

the net result of all these transfers of funds in both directions was that the defendant took $200,488 from CASI's bank accounts — i.e., $25,488 more than his approved $175,000 salary, whether these excess withdrawals be characterized as "excess salary" or "personal loans." (GX 114; Tr. 801-03, 806-07).

Hence, Riley's analysis did not overlook the "$36,000 worth of checks from the defendant's personal bank account to CASI" with which she was "confronted" on cross examination (Br. 5). Nor did she fail to "give Dr. Karron credit for uncollected salary" (Br. 6). As Government Exhibit 110, page 38 of 44, shows, Riley's summary took into account the $37,000 worth of checks to which the defense referred, as well as the fact that the defendant did not accept a regular paycheck every month in Year 1 of the grant. Nonetheless, because the defendant withdrew more money from CASI than he put in, the net result was that, aside from various miscellaneous refund checks in 2002, CASI, on net, had no other source of funding other than the ATP grant in both years of the grant. (GX 110, at 4 of 37; GX 112, 113).[3]

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[3] This conclusion is consistent with Lee Gurfein's testimony that "the only funds we had were funds from NIST, ATP funds." (Tr. 645). Gurfein testified that one of his primary responsibilities at CASI was fundraising, "attempting to obtain additional funds for CASI that would be supplemental to the funds coming from NIST." (Tr. 625). Nevertheless, during his tenure at CASI from 2001 to 2002, "there were no other funds that I knew about that came into the company."

Robert Benedict, the business manager at CASI from 2002 to 2003, testified to the same effect regarding funding during

With respect to the expenditure of the money in CASI's accounts, the financial records again establish that it went to pay for expenses that the defendant was repeatedly told ATP would not fund. For example, Karron used ATP funds to pay for, among other things, rent (GX 110, at 39 of 44), a cleaning lady for his condominium (GX 110, at 36 of 44), utilities such as electricity, cable, telephone, and Internet services (GX 110, at 30-35), home renovation and hardware tools (GX 110, at 20-21), and restaurant meals (GX 100, at 22-25). All told, Karron misapplied more than $268,000 in Year 1 of the grant, and more than $196,000 in Year 2 of the grant, for a total of approximately $465,000.

4. Karron Misapplied ATP Funds Against The Warnings Of His Bookkeeper And Business Managers

To show that Karron's misapplication of federal grant funds was intentional, the Government presented devastating proof that Karron's own employees repeatedly told the defendant to stop doing so and also warned him about the potential consequences of openly flouting ATP grant rules.

Frank Spring, a bookkeeper the defendant hired in July 2002 to manage CASI's books, testified that, once he became familiar with the rules and regulations of the ATP grant, he had a series of conversations with the defendant after he noticed

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Year 2 of the grant. See Tr. 1052 ("All of the money that was in all of the accounts was NIST money."); Tr. 988 ("You could tell there was no money coming in from any other source other than ATP.").

that certain non-grant-related expenses — "rent, utilities, certain amounts of capital expenditures . . . , and medical expenses" — were classified as ATP expenses in CASI's books and records. (Tr. 840-42). In response, the defendant told Spring that Spring did not know what he was doing and that the defendant was "in conversation with the ATP managers in Washington to ensure that these expenses . . . would be allowed." (Tr. 842). With respect to the use of ATP funds to pay rent, in particular, the defendant also told Spring that, if asked, he would simply "tell the ATP managers that he lived in Connecticut" to buttress his argument that the apartment was used as an office not a home, and, thus, rent should be allowed to be paid for using grant money. (Tr. 854-55).

Furthermore, on multiple occasions, "between one dozen and two dozen times," (Tr. 844), when Spring treated certain expenses as non-ATP expenses in CASI's books, Karron changed them back as allowable expenses. When Spring confronted the defendant about the defendant's "mucking about" in the company's books (GX 145, at 2), the defendant again told Spring he did not know what he was doing and that the defendant "would be having meetings with the ATP managers to clear up all of these matters." (Tr. 843). Spring, however, never received any written approval from NIST approving the expenses in question. (Tr. 853).

Contemporaneous e-mail involving the defendant corroborated Spring's testimony about these discussions. (GX 142-45, 147, 149). For example, in an e-mail dated November 30, 2002, the defendant wrote to Spring, "I [ ] have problems with the entire way you are splitting the costs between atp and non atp. We need to fix this. . . . I need to review all of the non program items. . . . I will work with or without you to develop new reports. . . . I prefer to do this with you." (GX 144, at 3). In another e-mail dated June 21, 2003, the defendant, in response to Spring's continuing complaints about the defendant's characterization of cleaning and home renovation expenses as grant-related expenses, wrote, "Please, you are not to make interpretations as to allowability or category. You need to be a bookkeeper, not [a] business owner. I know you like to think like an owner, but I own this little dingy, not you." (GX 147). Finally, in an e-mail to a friend dated December 18, 2002, the defendant repeated the lie about living in Connecticut that he had discussed with Spring: "I will make a lease with Windy [in Connecticut] and make like I only keep a folding bed on 33rd Street. If ATP buys into this idea, then I can charge my rent on the apartment to the grant and pay my mortgage." (GX 213).

The defendant's business manager from 2001 to 2002, Lee Gurfein, likewise testified that he tried to stop the defendant from spending taxpayers' money on disallowed expenses, but to no

avail. To begin with, exactly one week after the grant was awarded, the defendant stripped Gurfein of his signatory authority. (Tr. 639-41). Furthermore, when the defendant admitted to Gurfein that he had transferred $75,000 out of the initial $150,000 infusion of cash from ATP to pay off "personal obligations to his family" and credit card debts, Gurfein told the defendant "he couldn't do that." (Tr. 637-38). In response, the defendant said simply that "he had no choice; he had to get rid of those debts." (Tr. 638). When the defendant continued to spend grant funds outside of the parameters of the approved budget, Gurfein kept confronting the defendant and reminding him of the need to "apply for a written approval." (Tr. 643). The defendant's "constant refrain" was: "I'm the principal investigator, and I can do anything I want" and NIST would approve the expenditures later because "they [NIST] loved me." (Tr. 667, 697).

Robert Benedict, the business manager the defendant hired to replace Lee Gurfein during Year 2 of the grant, testified that when the defendant persisted in using ATP funds to pay for non-grant expenses, he went before CASI's board of directors to request that CASI's checkbooks, along with the company's books and records, be turned over to the bookkeepers for safekeeping. (Tr. 978-79). But even this drastic measure failed to stop the defendant from misspending ATP funds. Karron

began using an electronic bills-paying service called PayPal to circumvent the restriction on his check-writing ability – i.e., instructing PayPal to write checks on his behalf and then paying PayPal using the company's AMEX credit card. (Tr. 980-81). When Benedict confronted the defendant about his use of ATP funds to pay for disallowed expenses, the defendant said, "I have to pay the bills." (Tr. 982-83). Toward the end of Benedict's tenure at CASI when NIST began making inquiries about CASI's accounting, Benedict even told the defendant that "this was very serious," that "he could go to jail for this," and that "he could have between 300[,000] and 500,000 of disallowed expenditures." (Tr. 997). Once again, as he did with previous admonitions from NIST officials and his own employees, the defendant dismissed this warning. Referring to the amount that he owed NIST, Karron told Benedict, "[D]on't worry about it, my mom's got it." (Tr. 997).

B. The Defense Case

The defense called six witnesses: a real estate broker who testified to the resale price of the defendant's apartment (Tr. 1096-100); the owner of the company that renovated the defendant's apartment who testified to the nature of the renovation work on the apartment; (Tr. 1102-123); three character witnesses who testified to the defendant's reputation for truthfulness and honesty (Tr. 1135-60); and a friend who testified that Karron never lived with her in Connecticut during

the time period charged in the Indictment, but lived in his own apartment in Manhattan (Tr. 1180-85).

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO CONVICT KARRON

A. Applicable Law

1. Standard Of Review

A defendant challenging the sufficiency of the evidence under Rule 29 bears a "heavy burden." United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000). In considering a motion for judgment of acquittal, "[t]he Court 'must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.'" United States v. Guadagna, 183 F.3d 122, 129 (2d Cir. 1999) (quoting United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984)).

Accordingly, a motion under Rule 29 must be denied if "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Guadagna, 183 F.3d at 130 (quoting United States v. Resto, 824 F.2d 210, 212 (2d Cir. 1987)). "In other words, the court may enter a judgment of acquittal only if the evidence that the defendant committed the crime is 'nonexistent or so meager that

no reasonable jury could find guilt beyond a reasonable doubt.'" Id. (citation omitted); see also United States v. Hernandez, 85 F.3d 1023, 1029 (2d Cir. 1996).

In considering the Government's proof under Rule 29, the Court must view the evidence in the light most favorable to the Government, see Autuori, 212 F.3d at 114; Guadagna, 183 F.3d at 129, and must "credit[] every inference that the jury might have drawn in favor of the government." Hernandez, 85 F.3d at 1029; see United States v. Diaz, 176 F.3d 52, 89 (2d Cir. 1999); United States v. Morrison, 153 F.3d 34, 49 (2d Cir. 1998); United States v. Allah, 130 F.3d 33, 45 (2d Cir. 1997); United States v. Masotto, 73 F.3d 1233, 1241 (2d Cir. 1996). Similarly, the Second Circuit has repeatedly emphasized that to defeat a Rule 29 motion, "the government need not 'exclude every reasonable hypothesis other than that of guilt.'" Guadagna, 183 F.3d at 130 (quoting Holland v. United States, 348 U.S. 121, 139 (1954)); see United States v. Sureff, 15 F.3d 225, 229 (2d Cir. 1994) ("The government's case need not exclude 'every possible hypothesis of innocence.'") (quoting United States v. Friedman, 998 F.2d 53, 59 (2d Cir. 1993)); United States v. Davis, 8 F.3d 923, 928-29 (2d Cir. 1993). Even where the evidence permits an innocent inference, the task of choosing among the permissible inferences is for the jury, not for the Court. See United States v. Taylor, 18 F.3d 55, 57-58 (2d Cir. 1994); United States v. Matthews, 20

F.3d 538, 548 (2d Cir. 1994); see also United States v. Rosa, 17 F.3d 1531, 1542 (2d Cir. 1994) ("The fact that a trier of fact has declined to draw one of two or more competing inferences does not mean that the inferences drawn were not available or were not reasonable"). Accordingly, where "either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, [the Court] must let the jury decide the matter." Autuori, 212 F.3d at 114 (internal quotation marks omitted). Consistent with this approach, all issues of credibility must be resolved in the Government's favor. See United States v. Abelis, 146 F.3d 73, 80 (2d Cir. 1998).

Finally, in assessing the proof at trial, the court must analyze each piece of evidence "not in isolation but in conjunction," Matthews, 20 F.3d at 548, and must apply the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from others." Guadagna, 183 F.3d at 130; see also United States v. Monica, 295 F.2d 400, 401 (2d Cir. 1961). There is no requirement of what kind of evidence the Government must present to withstand a Rule 29 motion; the Government's case may in fact be based "entirely on circumstantial evidence" though it is clearly not so here. United States v. Sureff, 15 F.3d at 228 (citation omitted).

2. Elements Of The Offense

In order to sustain its burden of proof with respect to the charge in the Superseding Indictment, the Government must prove beyond a reasonable doubt the following five elements:

> First, at the time alleged in the Superseding Indictment, the defendant was an agent of Computer Aided Surgery, Inc., or CASI;
>
> Second, in a one-year period, CASI received federal benefits in excess of $10,000;
>
> Third, the defendant intentionally misapplied money or property;
>
> Fourth, the misapplied money or property belonged to, or was under the care, custody, or control of CASI;
>
> Fifth, the value of the intentionally misapplied money or property was at least $5,000.

Adapted from L. Sand, et al., Modern Federal Jury Instructions, Instr. 27A-2; Seventh Circuit Pattern Criminal Jury Instructions to 18 U.S.C. § 666(a)(1)(A).

B. Discussion

The Government presented more than ample evidence to support the jury's finding that each and every element of the offense was satisfied. There is no dispute between the parties that the Government presented sufficient proof to establish

> 1) that at the time alleged in the Superseding Indictment, Karron was the President and Chief Technical Officer of CASI (GX 10);
>
> 2) that CASI received federal benefits in excess of $10,000 each year from 2001 to 2003 (GX 13);
>
> 3) that the alleged misapplied money was in CASI's control and custody (GX 81, 110).

Hence, the only issue in dispute here, as it was at trial, is whether Karron intentionally misapplied ATP funds by repeatedly violating the terms of the grant and whether the amount of the misapplication exceeded $5,000.

As shown above, the evidence at trial overwhelmingly established the defendant's guilt. With respect to the misapplication of funds, the financial records (GX 81, 90, 100-04) and Riley's databases and graphs summarizing them (GX 110-15) unequivocally demonstrate, first, that, on net, CASI had no other source of funds aside from ATP and second, that Karron used the ATP grant funds in CASI's business accounts to pay for various expenses not included as part of the approved budget.

Neither in its arguments to the jury nor in the instant Rule 29 submission does the defense take issue with these financial records. Instead, it focuses on various audit reports prepared by Joan Hayes (an uncalled witness) and Riley at a time when neither of them had access to the financial records described above and had to rely almost exclusively on CASI's books and records, which were admittedly imperfect and in a state of flux. (Br. 4-6) (Tr. 518, 607, 1284-85, 1307). Hence, the defendant asserts, for example, that Riley's audit report relied too heavily on the audit findings reached by Hayes, who alleged lacked independence to conduct an audit for the company, and that

Riley could not adequately defend her audit findings on cross examination.[4]

But as the Government explained to the jury, the defense's quibble with these audit reports is a red herring because the Government did not rely on any of these audits to prove the misapplication of ATP funds. (Tr. 1262) ("You don't have to rely on Ms. Riley's on anyone else's audits in this case"). Instead, to take the guesswork out of the analysis, the Government built its case on financial records provided directly by Chase Bank and American Express to show the inflows and outflows of funds at CASI. (Id.) With these financial records in hand, Riley completed an analysis, independent of her earlier audits, that summarizes, transaction by transaction, how CASI got its money and where the money went. (GX 110-15). The defendant's extended critique of the methodology Riley used in her audits, even if true, therefore simply have no bearing on

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[4] The defendant also argues that he "was precluded from cross-examining [Riley] with [the underlying documentation] because she did not have them with her." (Br. 6). This argument misrepresents the record. As an initial matter, because the documents that Riley examined in the course of preparing her audit report were CASI's books and records, the defendant had access to them and could have used them effectively to cross examine the witness if he so desired. Moreover, after Riley indicated in the middle of cross examination that she would like to re-examine certain documents to refresh her recollection, those documents were furnished to her as well as to the defense for review before cross examination resumed on the next day. (Tr. 619-20, 710). Before resuming cross examination, defense counsel made no objection that he did not have an adequate opportunity to review the documents that Riley examined.

Riley's analysis based on the financial records that was crux of the Government's case.

To the extent the defense challenges the databases Riley prepared based on the financial records, its arguments are demonstrably wrong. For example, the defendant argues that Riley erred by failing to take into account "$36,000 worth of checks," marked as Defense Exhibit FFF, "from the defendant[']s personal bank account to CASI." (Br. 5). The defendant also faults Ms. Riley for not "giv[ing] Dr. Karron credit for uncollected salary." (Br. 6). As GX 110, page 38 of 44, shows, however, every single one of the checks marked as Defense Exhibit FFF was taken into account, plus an additional $1,000 not included in Defense Exhibit FFF that increased the total contribution by the defendant to $37,000. And as page 39 of the same Exhibit shows, Riley likewise did not neglect to take note of the fact that the defendant did not accept a paycheck every month.

However, as explained above (see pp. 10-11, supra), these transfers from the defendant to CASI were dwarfed by transfers in the opposite direction, with the net result that, the defendant withdrew approximately $25,488 more than the amount to which he was entitled under the approved budget. (GX 110, at 38 of 44; GX 114, table).

Similarly wide off the mark is the defendant's assertion that "Ms. Riley's claim of an additional $54,850 in

loans [as shown in GX 110, at 38 of 44] is totally unsupported by the evidence," and his "speculat[ion]" that these entries were based on Riley's "uncritical" reliance on some unknown documents the defense had never seen. (Br. 5-6).

To the contrary, these entries in the database are borne out by the Chase Bank records that were admitted in evidence and produced to the defense in discovery (GX 81). By way of illustration, Riley's database (GX 110, at 38 of 44) shows that checks bearing check numbers 3144, 3145, and 10407 were written transferring $1,000, $5,000, and $750, respectively, from CASI's account into the defendant's personal bank account. These database entries are based on copies of the actual checks signed by "DB Karron" (attached hereto as Exhibits A, B, and C, and bearing discovery bates stamp 1663, 1664, and 2436) and the monthly bank statements documenting the same (attached hereto as Exhibit D, and bearing discovery bates stamp 1415-18, 1394-95).

As the above examples show, the simple and irrefutable fact established at trial is that, on top of the various expenditures the defendant made using ATP funds, the defendant took cold, hard cash from CASI's account and deposited it into his own personal account. In Year 1, such withdrawals totaled approximately $25,000 more than the amount of his approved salary. (GX 114). In Year 2, the amount was close to $15,000. (GX 115). Based on the above, and in light of the repeated

warnings voiced by NIST personnel and the defendant's own managers and bookkeeper, a reasonable jury could certainly conclude that the defendant intentionally diverted cash belonging to CASI, and funded by ATP, to his own use.[5]

Citing Title 14, Code of Federal Regulations, Section 62,[6] the defendant nonetheless complains that he was unfairly "denied" the opportunity to "negotiate" changes to the budget in a "post-audit appeals process." (Br. 7). This argument fails for three reasons. First, the crime of misapplication is complete once the defendant misapplied $5,000 or more in federal funds and did so with the requisite intent. See Sand, Modern

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[5] The defendant's other assertions about the use of ATP funds are similarly belied by the documentary evidence. For example, without any citation to the record, the defendant baldy states that "the rent paid was paid out of Dr. Karron's legitimately earned salary."

As documented in GX 110, at page 39 of 44, and copies of the actual checks (attached herein as Exhibit E), rent was paid out of CASI's business accounts, not from "Dr. Karron's legitimately earned salary." For example, in check number 2977, the payor was shown as "Computer Aided Surgery, Inc."; the payee was "D.B. Karron"; the amount of the check was $2,000; the memo line read: "Rent on office: 300 East 33rd Street, Suite 4N"; the signature was "DB Karron."

[6] The pertinent part of the regulation reads as follows:

> In taking an enforcement action, the awarding agency shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

15 C.F.R. § 14.62(b).

Jury Instr., 27A-2. Because none of the elements of the crime is conditional on what may or may not happen in a later administrative proceeding, this argument is, quite simply, beside the point.

Second, the administrative appeal process provided for under the Code of Federal Regulations was not available to the defendant because no administrative enforcement action was ever taken; instead, the case was referred to the Department of Justice for criminal prosecution. Likewise, the grant was suspended, not because of any administrative enforcement action, but because an Indictment was returned by a Grand Jury. (See Defense Exhibit B; Tr. 242). Once the criminal process was initiated, the defendant was afforded all the rights – indeed, the more extensive rights – of a criminal defendant, including the right to a jury trial that he exercised. In short, no administrative rights were applicable, and none was "denied," because the enforcement process was not administrative in nature.

Third, to the extent the defendant's argument is that the misapplication of the grant funds was not intentional because the defendant thought, albeit mistakenly, he could participate in an administrative audit resolution process where he could "negotiate" the disallowed expenses (Br. 8), the argument also fails. As even the defendant appears to concede, the defendant's

belief, even if mistaken, has to be in "good faith" to vitiate intent. (Br. 8).

However, the Government introduced an email written by the defendant to a person named Professor Schwartz, dated August 20, 2003, that belies any claim of "good faith" belief on the defendant's part. Instead, what the defendant had in mind was nothing less than financial blackmail that further underscores his intent to cheat the Government:

> I am weigh[]ing abandoning the grant at this point, and forcing the government to try to collect 1.4M from me and make the grant enough of a train wreck that they have to cooperate on finding a liveable solution for all of us. It is that bad and I am ready to shove the situation to such a unpalatable end that we get some cooperation from them.

(GX 203, at 3; Tr. 1083-86).[7]

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[7] In addition, contrary to the defendant's argument, the defendant never "successfully negotiated with NIST over the payment of utility bills" that could have given him a reasonable basis to believe that the ATP rules were somehow "negotiable." (Br. 7). There is no evidence in the record to show that any such negotiation reached fruition. The defendant's citation to page 780 of the transcript shows simply that the defendant attempted to engage NIST in such discussions, not that NIST agreed with the defendant's position. (Br. 7; Tr. 780).

Indeed, as Lide and Snowden both testified, while NIST does engage in discussions with recipients about revising an approved budget, those revisions are on a prospective basis only. (Tr. 236, 266-68, 436). As they explained to grant recipients at the kick-off meeting (Tr. 267), "[I]f you need changes" for the "next period of funding," "you have to request approval of a revised budget. Other than that, the budget that was approved is the budget that you have to abide by." (Tr. 267). In light of this presentation, the jury was entitled to conclude that no reasonable person could have believed, as the defendant appears

Finally, citing 15 C.F.R. § 14, the defendant argues that there is in fact no requirement that a grant recipient seek prior approvals before deviating from his approved budget. (Br. 9-13). Because the Government's case was purportedly based on the "defendant's failure to comply with administrative rules embodied in 15 CFR 14," the defendant urges this Court to set aside his conviction. (Br. 9).

This argument fails because of its faulty premise: The Government's case was not premised on the "defendant's failure to comply" with the Code of Federal Regulations. As demonstrated by the documentary proof introduced at trial, the Government's case was based instead on the defendant's failure to comply with the rules and regulations specific to the ATP grant, which were explained to him by Bettijoyce Lide, Hope Snowden, and others, and which impose obligations more stringent than those contained in the CFR. (GX 1-4). In discussing the prior approval requirement, the ATP rules are explicit on this point:

> PRIOR APPROVAL REQUIREMENTS
>
> In addition to the requirements specified in 15 CFR 14.25, Recipients shall obtain prior written approval from the NIST Grants Officer for the following changes:
>
> a. The transfer of funds among direct cost categories must be approved in advance by the

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to suggest (Br. 8-9), that ATP rules could be broken at will because those violations could somehow be negotiated away at a later time through the so-called "audit resolution process."

> Grants Officer if the transfer exceeds 10% of the approved total annual budget for each single Recipient . . . participant for each approved project year. Recipients are not authorized to create new budget categories without prior approval. The Recipients are not authorized at any time to transfer amounts budgeted for direct costs to the direct cost line item.

(GX 2, at 3).

Lide and Snowden both testified to the same effect regarding the primacy of ATP rules and the prior approval requirement. See, e.g., Tr. 232 ("[ATP rules] overrule[] any other federal cost principles."); Tr. 299 ("Your ATP rules supersede all other rules because they're program-specific rules.").

Furthermore, the testimony is clear that while the NIST is open to negotiating changes to the budget in subsequent years, those changes have to be approved beforehand before ATP funds could be used. NIST's flexibility in negotiating prospective changes does not, in any way, vitiate the prior approval requirement:

> Question: Just to be clear, second bullet point there ["Review costs at the end of each year and submit a revised budget and narrative if changes have occurred"] is not overruling the prior approval requirement?
>
> Answer: No.

(Tr. 236) (Lide's testimony, discussing GX-4, at 11).

POINT II

A NEW TRIAL IS NOT WARRANTED BASED ON THE CONTESTED JURY INSTRUCTION

A. Applicable Law

1. Standard Of Review

Rule 33 of the Federal Rules of Criminal Procedure authorizes a district court to grant a new trial "if required in the interest of justice." F. R. Crim. P. 33. Because motions for a new trial are disfavored in this Circuit, "the standard for granting such a motion is strict," United States v. Gambino, 59 F.3d 353, 364 (2d Cir. 1995), and it should be granted only with "great caution and in the most extraordinary circumstances." United States v. Stewart, 433 F.3d 273, 296 (2d Cir. 2006); see also United States v. Locascio, 6 F.3d 924, 949 (2d Cir. 1993); United States v. Spencer, 4 F.3d 115, 118 (2d Cir. 1993); United States v. Imran, 964 F.2d 1313, 1318 (2d Cir. 1992). It is well settled that a motion for a new trial should not be granted unless, after evaluating all of the evidence, the district court is left with a "real concern that an innocent person may have been convicted." United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992). Ultimately, the relevant test is whether "it would be a manifest injustice to let the verdict stand." United States v. Ferguson, 246 F.3d 129 (2d Cir. 2001) (quoting United States v. Sanchez, 969 F.2d at 1414).

2. Challenge to Jury Instructions

A defendant challenging a jury instruction bears the burden of demonstrating both that he requested a charge that "accurately represented the law in every respect" and that the charge delivered was erroneous and prejudicial. United States v. Nektalov, 461 F.3d 309, 313-14 (2d Cir. 2006); United States v. Wilkerson, 361 F. 3d 717, 732 (2d Cir. 2004); United States v. Mulder, 273 F.3d 91, 105 (2d Cir. 2001). A jury instruction is erroneous if it "misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." United States v. Nektalov, 461 F.3d at 313 (quoting United States v. Wilkerson, 361 F.3d at 732). In reviewing jury instructions, this Court does not look only to the particular words or phrases questioned by the defendant, but must "'review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law.'" United States v. Carr, 880 F.2d 1550, 1555 (2d Cir. 1989) (quoting California v. Brown, 479 U.S. 538, 541 (1987)); see also United States v. Mulder, 273 F.3d at 105 (court must "look to 'the charge as a whole' to determine whether it 'adequately reflected the law' and 'would have conveyed to a reasonable juror' the relevant law") (quoting United States v. Jones, 30 F.3d 276, 284 (2d Cir. 1994)). Furthermore, "[r]eversal is only required if the instructions,

viewed as a whole, caused the defendant prejudice." United States v. Naiman, 211 F.3d 40, 51 (2d Cir. 2000).[8]

B. Discussion

1. The Jury Instructions Were Not Erroneous

Here, the defendant cannot show that the jury instructions were erroneous, much less prejudicial. The defendant attempts to argue, without citing any authority in support, that in this case, where the defendant was charged under the intentional misapplication/theft prong of Section 666 - 18 U.S.C. § 666(a)(1)(A) - as opposed to either of the two bribery prongs - 18 U.S.C. §§ 666(a)(1)(B) and (a)(2) - the Government was required to prove that the misapplied funds were "directly traceable to the ATP grant." (Br. 15, 19-23). The defendant further argues that the description of the third and fifth elements of the crime contained in the jury instructions set up "conflicting standards" because the third element incorporated a tracing requirement, while the fifth element did not. (Id. at 17). These arguments are meritless.

First, the case law is absolutely clear that there is no tracing requirement for prosecutions under 18 U.S.C. 666; that

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[8] The case law cited above outlines the relevant analysis on appellate review. However, District Courts have found this framework helpful in determining whether "manifest injustice" existed to grant a new trial pursuant to Rule 33 on the basis of a challenged jury instruction. See, e.g., United States v. Funaro, 222 F.R.D. 41, 46-47 (D. Conn. 2004).

is, the Government need not specifically trace the flow of federal moneys to link them dollar-for-dollar to the misappropriated funds. See United States v. Coyne, 4 F.3d 100, 109 (2d Cir. 1993) ("The language [of Section 666] neither explicitly nor implicitly requires that the $10,000 [of federal funds] be directly linked to the program that was the subject of the bribe."); United States v. Urlacher, 784 F. Supp. 61, 63-64 (W.D.N.Y. 1992) ("There is no requirement that the property actually embezzled be federal money or traceable to federal money."), aff'd, 979 F.2d 935 (2d Cir. 1992); see also United States v. Valentine, 63 F.3d 459, 464 (6th Cir. 1995) ("[T]here is no need for the United States to trace the stolen money."); United States v. Simas, 937 F.3d 459, 463 (9th Cir. 1991) ("By enacting section 666, Congress plainly decided to protect federal funds by preserving the integrity of the entities that receive the federal funds rather than requiring the tracing of the federal funds to a particular illegal transaction."); United States v. Westmoreland, 841 F.2d 572, 577 (5th Cir. 1988) ("Congress specifically chose to [preserve the integrity of federal funds] by enacting a criminal statute that would eliminate the need to trace the flow of federal moneys . . .").

As the legislative history of Section 666 makes clear, Congress specifically designed the statute to eliminate a tracing requirement in order to circumvent the problems, such as co-

mingling of federal and non-federal funds, that prosecutors had faced using pre-existing statutes to charge crimes involving bribery and embezzlement of federal funds. See United States v. Westmoreland, 841 F.2d at 576 ("[Senate Report 225] indicates that one of the purposes for enacting the new provisions in section 666 was to fill a gap caused by the difficulty of tracing federal monies."). As the Senate Report states:

> [T]here is no statute of general applicability in this area, and thefts from other organizations or governments receiving Federal financial assistance can be prosecuted under the general theft of Federal property statute, 18 U.S.C. § 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds.

United States v. Coyne, 4 F.3d at 109 (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 369, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3510) (emphasis added); Westmoreland, 841 F.2d at 576-77 (same). In eliminating the tracing requirement from Section 666, "Congress decided that the most effective way to insure the integrity of the federal funds disbursed to sub-national agencies was to change the enforcement paradigm from one that monitored federal funds to one that monitored the integrity

of the recipient agencies." United States v. Sabri, 326 F.3d 937, 944 (8th Cir. 2003), aff'd Sabri v. United States, 541 U.S. 600 (2004); see also United States v. Simas, 937 F.2d at 463 (same); Westmoreland, 841 F.2d at 578 (same).

Recently, the Supreme Court affirmed this line of reasoning in response to a constitutional challenge to Section 666, holding even more broadly that Section 666 does not require any connection whatsoever between "forbidden conduct and federal funds." Sabri v. United States, 541 U.S. at 604. As the Supreme Court explained,

> It is true, just as Sabri says, that not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a quid pro quo for some dereliction in spending a federal grant. . . . But this possibility portends no enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there.

Sabri, 541 U.S. at 605 (citation omitted).

The defendant asserts that the reasoning and holding of Sabri and the other cases relied upon by the Government, most of which involved defendants charged with bribery under 18 U.S.C. §§ 666(a)(1)(B) or (a)(2), apply only to the bribery prongs of

Section 666 and not to the intentional misapplication/theft prong (18 U.S.C. § 666(a)(1)(A)) under which Karron was charged. (Br. 19-20). However, since Sabri was decided, every federal court that has considered the issue has decided that in light of Sabri, the Government need not prove a connection between the federal funding and the bribery or embezzlement that a defendant has allegedly committed, including cases where the defendant was charged under 18 U.S.C. § 666(a)(1)(A). See, e.g., United States v. Caro-Munoz, 406 F.3d 22, 26-27 (1st Cir. 2005) (Section 666(a)(1)(B) case, stating that "after Sabri, section 666 does not require a nexus between the alleged bribery and the receipt of federal funds"); United States v. Spano, 401 F.3d 837, 840 (7th Cir. 2005) (Section 666(a)(1)(A), (a)(1)(B), and (a)(2) case, recognizing that under Sabri, "no nexus between the bribe and federal funds is required"); United States v. Mirikitani, 380 F.3d 1223, 1225 (9th Cir. 2004) (Section 666(a)(1)(A) and (a)(1)(B) case, recognizing that "in Sabri, the Supreme Court not only held that a federal nexus was not an element of the crime, but it held that no federal nexus must be shown at all"); United States v. Kranovich, 401 F.3d 1107, 1111 (9th Cir. 2005) (Section 666(a)(1)(A) case, noting that under Sabri and Mirikitani, "the government was not required to establish any connection between the embezzled funds and a federal interest").

Indeed, the Seventh Circuit specifically rejected the argument that the defendant asserts here: "We note that the petitioner in Sabri challenged only § 666(a)(2) and that the defendants challenge § 666 as a whole, having been convicted under, variously, §§ 666(a)(1)(A), (a)(1)(B), and (a)(2). However, we see no reason for any differentiation in analysis among the (a)(1) and (a)(2) charges, which are basically two sides of the same coin (agents stealing federal funds/accepting bribes versus giving bribes to agents). . . . We therefore conclude that the Supreme Court did not intend to limit its holding to § 666(a)(2) . . . and would similarly find no nexus requirement for § 666(a)(1) offenses." United States v. Spano, 401 F.3d at 840 n.2.

Although the Second Circuit has not specifically addressed whether the holding of Sabri extends to defendants charged under Section 666(a)(1)(A), there is nothing in the Court's prior decisions to suggest it would incorporate a tracing requirement into this charge, especially given the Court's recognition of the reasons why a tracing requirement was eliminated from the statute in the first place. See Coyne, 4 F.3d at 109 (discussing the legislative history of Section 666, including the need to eliminate a tracing requirement to address the problem of co-mingling funds). Furthermore, in United States v. Naiman, 211 F.3d 40 (2d Cir. 2000), a case decided before

Sabri where the defendant was charged with, among other things, intentional misapplication of federal funds under Section 666(a)(1)(A), the Court indicated that the Government was not required to trace the misapplied money directly back to the federal funds. See United States v. Naiman, 211 F.3d at 48 ("We reject appellant's contention that the government was obligated to trace the cash obtained from the [misapplied funds] or show how Naiman used the cash.").[9]

In light of the overwhelming case law in this Circuit and elsewhere recognizing that there is no dollar-for-dollar tracing requirement for offenses charged under any prong of Section 666, and the complete absence of authority supporting the defendant's position, the Court was absolutely correct in instructing the jury, with respect to the fifth element of the offense, that "it [was] not necessary for the Government to show that the intentionally misapplied money was traceable to the

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[9] The defendant's attempt to distinguish Naiman on factual grounds misses the mark. (See Br. 21). The reason that Congress eliminated a dollar-for-dollar tracing requirement from Section 666, as recognized by the Second Circuit in Coyne, is that the previous enforcement scheme was ill-equipped to deal with situations where, for example, the federal character of the misapplied funds could no longer be shown because of co-mingling. See Coyne, 4 F.3d at 109. That rationale applies regardless of whether the company receiving the federal funds was a for-profit or a not-for-profit organization, and regardless of how egregious the misapplication was. For the same reasons, the defendant's argument that tracing is required in cases charged under 18 U.S.C. § 666(a)(1)(A) because of the different definitions of "theft" versus "bribery" is also unpersuasive. (See Br. 22-23).

federal grant received by the organization," and further that "[m]oney is fungible, and the Government need not trace the $5,000 or more alleged to be intentionally misapplied back to the federal grant." (Jury Instructions at 22, attached as Ex. F).

The Court's instruction with respect to the third element of the offense, which stated that the Government must prove that the defendant "intentionally misapplied the grant money" (Ex. F at 18), did not inject a dollar-for-dollar tracing requirement, nor did it conflict with the Court's instruction regarding the fifth element that the Government need not trace the $5,000 back to the federal grant funds. The Court recognized that in this case, the spending restrictions placed on the ATP grant funds extended only to those funds, not to any money that CASI might have had from other sources. Accordingly, the Court determined that there could be no intentional misapplication of funds unless the defendant misspent the ATP funds, as opposed to other CASI funds, in a manner that violated the rules of the ATP grant. As an example, the Court noted that if the defendant bought the projector screen (GX 124), which was not provided for in the ATP budget, but paid for it using CASI funds from a source independent from the ATP funds, then it would not be intentional misapplication (as long as it was not a personal purchase and CASI benefitted from the projector in some way) because the ATP spending rules did not affect how these non-ATP funds could be

spent. (See Tr. 706). For this reason, after a lengthy discussion at the charging conference, the Court included the word "grant" in the both the short and long descriptions of the third and fourth elements to clarify that the misapplied money had to be grant money. (See Tr. 1193-1220; Ex. F at 18-21). However, the Court did not include the word "grant" in its description of the fifth element in recognition of the Government's point that, even assuming that CASI had independent non-ATP funds to draw from (i.e., the defendant's "emergency loans" to CASI), the evidence showed that those funds were co-mingled with the ATP funds; hence, the Government need not trace dollar-for-dollar the misapplied funds back to the ATP grant moneys. (See Tr. 1211-1231; Ex. F at 18, 21-22).

Under these jury instructions, if the evidence at trial showed that the expenditures that the Government alleged were unallowable under the ATP grant rules were paid for using funds that were entirely separate from the ATP funds, then that would not establish intentional misapplication, as explained in the third element. However, if the evidence showed, as it in fact did, that the improper expenditures were paid for using a co-mingled source of funds that included ATP funds and other non-ATP funds (GX 110, 112-13; Tr. 973-75),[10] that would establish

[10] The only non-ATP funds in the CASI bank accounts that are identified by the defendant – his loans to CASI and his unclaimed salary in Year One of the grant – are discussed below

intentional misapplication, but the Government would not have to trace the misspent funds dollar-for-dollar back to the federal grant moneys, as explained in the fifth element. Accordingly, the Court's instructions with respect to the third and fifth elements were consistent and appropriately did not incorporate a tracing requirement as part of the Government's burden of proof.[11] Moreover, the jury instructions adhered to the reasoning of the case law in this area which recognized that Section 666 had been specifically designed to eliminate a tracing requirement to address this very issue of co-mingling of funds, which had frustrated attempts to prosecute these crimes under pre-existing statutes. See Coyne, 4 F.3d at 109; Westmoreland, 841 F.2d at 576-77.

2. The Defendant Was Not Prejudiced By The Jury Instructions

Not only were the jury instructions correct on the law, but the defendant cannot establish that he was prejudiced by the lack of a tracing requirement. As discussed above, the evidence at trial clearly established that, on net, CASI had no other source of funds aside from the ATP funds. The Chase Bank records

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in subsection 2.

[11] The jury instructions were also consistent with the Court's original formulation of these issues prior to trial, as cited in the defendant's brief. (See Br. 18) (citing Tr. 10) ("I don't think you have to trace the amount, but I think you have to show that the expenditure was made by using [grant] funds.").

from the CASI company accounts and the testimony of Belinda Riley established that, with the exception of approximately $1,170 in refund checks in Year Two of the grant, the ATP grant funds were, on balance, the only source of funds for CASI. (GX-112, GX-113; Tr. 517, 519, 543, 548-49). This was corroborated by both Lee Gurfein and Robert Benedict, who testified that CASI had no other funds besides ATP funds. (Tr. 645, 976, 988, 1052). The defendant points out that made several transfers from his personal account to CASI's business accounts (GX 110, at 38 of 44; at 32 of 37) and did not claim a portion of his first year salary (GX 110, at 39 of 44). (See Br. 17). However, these "contributions" were far outweighed by the personal loans and other disbursements that he paid himself out of the CASI business accounts (GX 110, at 38 of 44; at 32 of 37), and therefore did not, on net, add any funds to these accounts.

Taking Year One of the grant as an example, the defendant transferred $37,000 from his personal account to CASI's business account and accepted only $35,293 of his approved salary of $175,000. (GX 110, at 38-39 of 44). Assuming, arguendo, that these could both be considered non-ATP funds and therefore not subject to the grant requirements,[12] the defendant's total

[12] The Government disputes that the defendant's unclaimed salary qualifies as a separate source of funds that would not be subject to the ATP spending requirements. The Government does not dispute that once ATP funds are paid out as salary, those funds are no longer subject to the ATP spending restrictions and

"contribution" to CASI in Year One of the grant was $176,707. However, the defendant also made CASI lend him $129,850 and pay him $60,000 in rent over course of Year One of the grant (GX 110, at 38-39 of 44), for a total of $189,850. In other words, the defendant took more money out of the CASI bank accounts than he put in. Even if the rent payments were treated separately, the defendant's total "contribution" to CASI in Year One would be $46,857 ($176,707 - $129,850). If the entire $46,857 were put towards the $60,000 of rent payments for Year One of the grant, that would still leave $13,143 of rent payments that were paid for using ATP funds. Accordingly, even taking into account the defendant's so-called "contributions" to CASI, ATP funds had to have been used to pay for disallowed expenditures, rendering the tracing issue moot.[13]

Furthermore, the defendant's argument that the omission of a tracing requirement from the jury charge caused the Government to alter its Government's theory of the case is simply false. (See Br. 17-19). As is evident from the Government's request to charge, which was submitted to the Court well before

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the recipient is free to spend the money as he chooses. However, if certain ATP funds are budgeted for salary, but are never paid out as such, those unclaimed funds are simply surplus ATP funds and remain subject to the grant requirements.

[13] This example highlights the problem of tracing co-mingled funds, and perfectly illustrates why Congress decided not to include a tracing requirement in Section 666.

trial, the Government maintained from the beginning that it did not need to show that the misapplied funds were directly traceable back to the federal grant moneys. (Government's Request to Charge at 10-11, attached as Ex. G). The Court's comment just prior to the start of the trial that it did not think the Government had to "trace the amount," but did have to show that "the expenditure was made using [grant] funds," did not alter the Government's conception of its burden of proof. (Tr. 10). Indeed, the Government maintained that there was no tracing requirement and that the jury should be so instructed, but that in this case it did not matter because virtually all of the CASI funds were ATP funds. (Tr. 9-10). Hence, the opening and closing statements were entirely consistent with the Government's theory of the case, which remained constant throughout the course of the trial.

Accordingly, the defendant cannot claim that the jury instruction prejudiced him in any way. A new trial is therefore unwarranted.

3. Letting The Verdict Stand Would Not Result In "Manifest Injustice"

For the reasons discussed above, it cannot credibly be asserted that allowing the verdict to stand would result in "manifest injustice." Furthermore, two additional points undermine the defendant's claim that he should be granted a new trial in the interests of justice. First, although the defendant

claims that the jury charge was incorrect and conflicting, he did not provide the Court with an alternative jury instruction that he found satisfactory. See United States v. Torres, 845 F.2d 1165, 1171 (2d Cir. 1988) (noting that the defendant did not submit proposed language for a requested jury charge and therefore the court could not evaluate whether it accurately reflected the law).

Second, defense counsel flip-flopped his position about the need for a tracing requirement. At first, defense counsel had no objection to the proposed jury charge, agreeing that it did not need to include a tracing requirement and that he would not press that argument in summation. (Tr. 1214) ("Judge, [the Government has] no concern, because I'm not going to argue it. I'm not going to argue tracing of funds and what have you."). Only minutes later, defense counsel abruptly changed his position in midstream after "reconsidering" the issue, and for the first time argued that tracing was required. (Tr. 1223-34). Despite his new position, when the final jury charge was handed out to the parties and the Court noted that it had included language about the fungibility of money in the fifth element, defense counsel did not object (Tr. 1257), nor did he object at the close of the jury charge when the Court asked the parties if they had any further objections to the charge as read. (Tr. 1364). Under these circumstances it can hardly be said that the jury charge

was so defective that it would be "manifest injustice" to allow the defendant's guilty verdict to stand.

CONCLUSION

For the foregoing reasons, the evidence is more than sufficient to support the jury's guilty verdict. Accordingly, the defendant's Rule 29 motion should be denied.

Dated: New York, New York
July 21, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

CHRISTIAN R. EVERDELL deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on July 21, 2008, he caused to be served a copy of the foregoing Government's Memorandum of Law in Opposition to Defendant's Motion for a Judgment of Acquittal and for a New Trial by Federal Express on:

Ronald Rubinstein, Esq.
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I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. Section 1746.

CHRISTIAN R. EVERDELL

Executed on: July 21, 2008
New York, New York